**IN THE HIGH COURT OF BOMBAY AT GOA**

**FIRST APPEAL NO. 118 of 1997**

State Bank of India,
a body corporate constituted
under the State Bank of India
Act, 1955 and having its Head Office
Office at Bombay and one of its
Branch at Margao, Goa, duly
represented by its Manager,
(SIB Division), Shri D.R. Naik,
resident of Margao, Goa. ... Appellant.

Versus

1. Shri Jairam P. Kamat,
   Executive Director of
   M/s. Spark (Goa) Pvt.Ltd.,
   resident of Assnora, Bicholim,
   North Goa.

2. M/s. Spark (GOA) Pvt. Ltd.,
   a Company constituted under
   the Companies Act, 1956, having
   its registered office at
   Gosalia Building, Ground Floor,
   Margao, Goa, represented by its
   Managing Director, Shri Pramod
   P. Dhond, major in age,
   resident of Bicholim, Goa.

3. Shri Pramod P. Dhond,
   Managing Director of R.2,
   resident of Bailipath,
   Bicholim, North Goa.

4. Shri Suresh S. Rajadhyax,
   Director of the Company- R.2,
   resident of Shirodkar Building,
   Opp. St. Anne's School, Borda,
   Margao, Salcete, Goa. ... Respondents.

Shri P.P. Singh, Advocate for the Appellant.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Respondent No.1.

**CORAM: N. A. BRITTO, J.**

DATE OF RESERVING THE JUDGMENT: 19.03.2004
DATE OF PRONOUNCING THE JUDGMENT: 22.03.2004

**J U D G M E N T:**

The appellant/State Bank of India has filed the present appeal against the Judgment/Decree in Special Civil Suit No.81/1981 passed by the learned First Additional Civil Judge Senior Division, Margao, by which the Suit filed by the Bank against the defendant No.3 has been dismissed.

2. The said suit filed by the said Bank was earlier decreed against all the defendants by Judgment dated 16.07.1988, but only defendant No.3 (Respondent No.1) preferred an appeal to this Court, being First Appeal No.111/1988, and the Division Bench of this Court by Judgment dated 26.11.1996 allowed the appeal and set aside the said Judgment/Decree dated 16.7.1988 only to the extent it related to the defendant No.3 and directed the learned Civil Judge Senior Division to frame fresh issues in the light of the pleadings of the defendant No.3 and decide the matter afresh according to law.

3. Accordingly the learned First Addl. Civil Judge Senior

Division framed as many as eight issues and after the parties represented before him that they did not wish to lead any further evidence, proceeded to decide the suit based on the evidence earlier recorded.

4. The case of the appellant/Bank, briefly stated was that the defendant No.1 (Respondent No.2) was a Company carrying on business of manufacturing agricultural implements, ... etc. having its registered office at Gosalia Building, Margao and its manufacturing premises at B-3-3, St. Jose de Areal Industrial Estate, Margao, Goa of which defendant No.2 (Respondent No.3) was the Managing Director, Defendant No.3 (Respondent No.1) was the Executive Director and defendant No.4 (Respondent No.4) was the Director. Further it was the case of the Bank that in the year 1976 the said defendant Company was granted by the plaintiff at their request cash credit limit of Rs.1 lakh which was secured by stocks for working capital purposes and that the said cash credit facility was irregulary being operated due to financial crisis by the said defendant Company and, as such, the said **defendant** Company requested the Bank to put their account under the Bank's Rehabilitation Programme to enable the Company to carry out the operations on profitable lines and so the said defendants in November, 1978 approached the Bank and requested the Bank to grant to them a Demand Cash Credit limit of Rs. 2 lakhs i.e. Rs1 lakh for Ghamellas Division and Rs.1 lakh for

Stainless Division agreeing to pay to the plaintiff interest on the amount so advanced at the rate of 3.55% p.a. Below State Bank Advance Rate with a minimum of Rs.12.95% p.a. Further agreeing to hypothecate with the Bank movables, goods, book debts and other assets belonging to them. The Bank also stated that the defendants also requested the Bank to grant to them a Clear Term Loan to the extent of Rs.70,000/- agreeing to pay to the plaintiff interest on the amount so advanced at the rate of 5.50% p.a. below State Bank Advance Rate with a minimum of 11% p.a. And that the Bank accepted the said proposals/requests against the terms and conditions laid down in their letter dated 8.2.1979 and offered to grant to the defendants the said credit facilities.

5. It was the case of the Bank that the defendants in its Board meeting on 9.2.1979 passed a resolsution in order to obtain an advance to the tune of Rs.2 lakhs by way of cash credit, secured by hypothecation pledging of the Company's assets and guarantee of its Directors in their individual capacity, and also a Term Loan of Rs.70,000/- on terms and conditions laid down by the plaintiff and accordingly the defendants in respect of the said Demand Cash-Credit limit of Rs.2 lakhs, executed on 1.3.1979 an agreement for the grant of Small Industrial Advances and Hypothecation of movables, book debts and other assets and a supplemental Agreement and defendant Nos.2 to 4 signed a Guarantee Agreement on the same date (1.3.1979)

guaranteeing the payment in their individual capacity and jointly and severally. It is also the case of the Bank that the defendants in respect of the same Clean Term Loan of Rs.70,000/- executed on the same date (1.3.1979) a General Agreement for the grant of Medium Term Advances to Small Scale Industries and Hypothecation of movables, book debts and other assets. And the defendant Nos.2 to 4, on the same day signed a Guarantee Agreement for Small Industrial Advances, guaranteeing the payment in their individual capacity and jointly and severally.

The Bank stated that in view of the defaults committed by the defendants in their obligation under each of the said Agreements, the plaintiff recalled the various amounts lent and advanced under each of the said Agreements and ultimately by their Notice/letter, through their Advocate, dated 11.3.1981 called upon the defendants to pay to the Bank the amount then due in respect of the said Agreements, but defendant No.1 refused the said Notice/letter and defendant Nos.2 to 4 received the same on 13.3.1981, but none of the defendants replied to the said Notice nor tried to repay the dues. The case of the Bank therefore was that there is now due and payable jointly and severally by the defendants to them a sum of Rs.1,11,627.54 under the Agreement relating to the Demand Cash Credit limit of Rs.2 lakhs and a sum of Rs.88,966.29 under the Agreement relating to Clean Term Loan, both inclusive of interest upto

11.6.81 plus further interest from 12.6.81 till the date of effective payment.

6. On the other hand, the case of the defendant No.3 was that one Ramesh Sitaram Kanerkar along with defendant Nos.2 and 4 were the guarantors for the repayment of the said Demand Cash Credit of Rs.1 lakh granted to defendant No.1 and that the said Demand Cash Credit limit was not cancelled by the Bank at any time till the filing of the suit and that the outstanding in the said Demand Cash Credit limit together with interest are claimed in the present suit. Defendant No.3 therefore pleaded that the cause of action arose under the Agreement contained in the letter dated 26.2.1976 and that all the defendants were jointly interested in the said cause of action arising under the said letter dated 26.2.1976 and therefore the present suit was bad for multifariousness and non-joinder of necessary party.

The defendant No.3 admitted the execution of General Agreement and Ancillary Agreement on 1.3.79 (Exhs.P-1 and P-4) but denied the execution of the Guarantee Agreement on the same date (Exh.P-5) and stated that the defendant No.3 was induced to execute the Guarantee Agreement on 5.3.79 without disclosing the contents of the same. Defendant No.3 stated that he signed the Guarantee Agreement in printed form on the assurance of the Bank's Agent that

the said guarantee was to effectuate the terms and conditions as aggred to by the Bank and the first defendant in their primary Agreement dated 8.2.79 and therefore the said Guarantee Agreement was void and unenforceable as the same was not supported by consideration. Defendant No.3 also stated that the original consideration for General Agreement both dated 1.3.79 could not form the consideration for the guarantee Agreement dated 5.3.79. Defendant No.3 stated that the said Guarantee Agreement dated 5.3.79 was executed by way of security in terms of primary agreement dated 8.2.1979 and that the defendant No.3 never agreed to execute any guarantee as independent guarantee and/or as different from the security the plaintiff was bound to take from the lst defendant in terms of primary agreement dated 8.2.79. Defendant No.3 stated that the Bank accepted the proposal for Demand Cash Credit facility on the specific condition that the first defendant offered two securities: one of hypothecation of movables i.e. stocks of raw materials to the plaintiff to be kept under lock and key of the Bank to be supervised by the Bank's agent and secondly the personal guarantee of 2nd, 3rd and 4th defendants and that the defendant No.3 agreed to give personal guarantee on this specific undertaking and with the full knowledge of the Bank that the first defendant was offering another security namely mortgage of stocks of raw materials, semi-finished goods and finished products of the first defendant.

7. The defendant No.3 admitted the execution of the General Agreement for grant of Medium Term Advances/Loan for Rs.70,000/- and the Personal Guarantee of Defendant Nos.2, 3 and 4 in respect of the said loan to be granted by the Bank to the first defendant. The defendant No.3 stated that the General Agreement for the grant of Medium Term Advances/Loan and the Personal Guarantee executed has no connection with the outstanding under Demand Cash Credit Account from the Bank to the 1st defendant dated 26.2.76. Defendant No.3 stated that the General Agreement for grant of Medium Term Advances/Loan did not provide for conversion of outstandings in the first defendant's earlier Demand Cash Credit Account into a term loan for the purpose of the said General Agreement. Defendant No.3 therefore stated that these two accounts were separate,independent and open and the repayment of loan to be granted by the Bank to the first defendant under General Agreement was secured by the personal guarantee of defendant nos.2, 3 and 4 and the repayment of outstandings under Demand Cash Credit was secured by personal guarantee of defendant nos.2, 4 and one Ramesh Sitaram Kanekar. Defendant No.3 stated that the personal guarantee signed by him is void and unenforceable as the same is not supported by consideration. Defendant No.3 stated that the Bank was utterly negligent with respect of the handling of stocks of raw materials, mortgage and the security of raw materials was lost on account of the negligence of the Bank and the plaintiff having lost the security of

hypothecated movables and raw materials, the defendant No.3 stood discharged to the extent of the value of the security. The defendant No.3 stated that after the execution of the General Agreement for Medium Term Advances/Loan for Rs.70,000/- no amount was granted and/or paid by the defendant to the Bank and therefore guarantee given by the defendant No.3 could not be invoked. The defendant No.3 stated that he became Director of the first defendant on 24.11.78 and therefore he had nothing to do with the outstanding in the aforesaid account granted in 1976. Defendant No.3 denied that he was liable to pay Rs.88,966.29 or any part thereof.

8. Before going to the submissions made at the hearing of this appeal, a brief reference is required to be made to the evidence on record.

9. P.W.1 Mahadev Vishnu Kanerkar was the Acting Branch Manager of the Bank and he stated that somewhere in the year 1976 the Bank granted Cash Credit facility to the defendant No.1 upon the defendant executing: (i) General Agreement; (ii) Guarantee Agreement; and (iii) Arrangement Letter. He stated that subsequently they increased the limit of Cash Credit facility granted to the defendants and as a result they cancelled the aforesaid documents and fresh documents were executed and as the defendants were not maintaining the accounts properly and they were facing financial

difficulties they felt necessary to increase the limit of the facility and in November, 1978 they finalised rehabilitation programme for defendant No.1 and the Cash Credit facility was thereupon increased frojm Rs.1 lakh to Rs.2 lakhs as the defendants had informed them that they wanted to diversify their activities to mobilise their production of stainless steel. He stated that Rs.1 lakh was granted for existing activity and another Rs.1 lakh was granted for establishing stainless steel division and Rs.70,000/- was granted as Clean Term loan for the purpose of boosting the production activity and thereupon the defendants executed the documents namely: (i) General Agreement for the Small Scale Industries Advances and Hypothecation of Movables (Exh.P-1); (ii) Ancillary Agreement (Exh.P-2) for the grant of Small Advances regarding hypothecation of goods; (iii) Guarantee Agreement (Exh.P-3); (iv) General Agreement for the grant of Medium Term Advances (Exh.P-4;) and (v) Another Guarantee Agreement (Exh.P-5). He has also produced the resolution of the defendant no.1 dated 9.2.79 at Exh.P-6 and the Arrangement Letter dated 8.2.79 at Exh.P-7. He has further stated that in respect of the Cash Credit Account a sum of Rs.1,11,627.54 was outstanding and regarding the Term loan a sum of Rs.88,966.29 was outstanding with further interest on both from 12.6.81. In cross-examination he has stated that he could not say what was the outstanding balance due to be paid by the defendants in the Demand Cash Credit loan on 28.2.79. In further cross-examination he stated that the stock

hypothecated by the defendants to the Bank was lying in their factory premises and further admitted that they had not advanced any loan after execution of the Agreement (Exh.P-4). He admitted that the Bank had in its possession one key of the premises of the factory where the hypothecated goods were kept, but he did not know what was the value of the hypothecated assets as on the date of the filing of the suit. As regards the said Mr. Kanerker, he stated that he was the guarantor for the defendant No.1 in the year 1976, but was relieved by the Bank at the instance of the defendants.

On the other hand, the defendant No.3 admitted that he became Director of defendant No.1 on 24.11.78 in place of the said Kanerker after he resigned. He stated that before he became the Director, the Bank had given credit facility of Rs.1 lakh to the first defendant and the earlier Directors were guarantors for the credit facility. He admitted that under the rehabilitation programme the Bank offered to give advance of Rs.2 lakhs against hypothecation of goods and Clean Term Loan of Rs.70,000/- were executed and that the same were at Exhs.P-1 and P-4. He stated that thereafter on 5.3.1979 he was again called by the Bank and they were asked to execute two guarantee agreements namely Exh.P-3 and Exh.P-5 and the said Exh.P-5 was executed on 5.3.79, but no loan was given by the Bank under the Agreement for Medium Term advance of Rs.70,000/- . He admitted having received a notice from the Advocate

of the Bank and contacted the Bank officials since he was told by the Bank officials at the time of rehabilitation programme that the advance would be given for hypothecation of goods by the first defendant and therefore he asked the Bank (plaintiff) to hand over to him the goods hypothecated to the Bank by first defendant and he was told by the Bank that no goods were hypothecated with the Bank (plaintiff) by the first defendant and therefore he told them that in case he has given the goods, he could not pay the amount. He admitted that he was guarantor to the Bank by way of collateral security only. In cross-examination he admitted that defendant No.1 and other Directors had approached the Bank to put their Company under rehabilitation programme as their Company was running at a loss and that he and the other Directors of the Company had signed the documents in favour of the Bank.

10. It has been submitted by learned Advocate Shri Lotlikar, that the statement of D.W.2 Jairam has gone unchallenged as regards demand made by him to hand over the goods hypothecated to the Bank. However, it is to be noted that D.W.2 Jairam has not specified as to which of the officers of the Bank he met and told them to hand over the said goods when it is an admitted position that the said hypothecated goods were lying in the factory of the defendants. It is also not the case of the defendant No.3 that he had made any demand in writing. Defendant No.3 also did not raise a plea to that

effect in his written statement and therefore the defendant No.3 is not to be believed when he states that at his request the Bank refused to hand over the hypothecated goods to him.

In the above background three submissions have been made on behalf of the defendant No.3. The first is regarding multifariousness and non-joinder probably of the said R.S.Kanerker. This plea was part of Issue No.1. The learned Civil Judge, Senior Division came to the conclusion that the said Ramesh S. Kanerker was required to be joined as a party to the suit. However, I am not inclined to accept the said conclusion. It is an admitted position that under the rehabilitation scheme, all the defendants had executed fresh documents and, if at all, the suit was filed by the Bank, it was filed based on the said fresh documents executed by the defendants and therefore there was no question of the said R.S. Kanerker being a necessary party to the present suit. The proposal dated 8.2.79 – Exh.P-7 did stipulate that although the said Kanerker was permitted to retire from the Directorship, he would not be relieved as original guarantor in his personal capacity. But the defendants were fully aware at the time of execution of fresh documents that the same were being executed under the Rehabilitation Scheme and by way of regularisation of the earlier cash credity facility and therefore since the present suit was filed based on documents executed in March, 1979, there was no question of the said Kanerker being a necessary

party to the suit. Multifariousness is commonly referred to misjoinder of claims. There was no other claim in this suit except against the present defendants who had executed the said documents. Issue No.1, therefore, ought to have been answered against the defendant No.3.

15. The second plea taken on behalf of defendant No.3 is that there was no consideration for the clean loan of Rs.70,000/- . This was part of Issues Nos.3 and 4. As already seen, defendant No.3 has admitted having gone along with the other Directors to the Bank and having signed the said Deed of Guarantee (Exh.P-5) on 5.3.1979. He has also admitted that all the defendants had approached the Bank to put their Company under rehabilitation programme and that thereafter they had signed the said documents. There is no doubt that when the said Agreement (Exh.P-5) was executed there was no actual payment made of Rs.70,000/- but it is an admitted position the said document was executed by way of regularisation of the earlier advance under the rehabilitation programme and that was sufficient consideration for execution of the said Agreement (Exh.P-5).

12. Learned Advocate Shri P.P. Singh has placed reliance on the case of **Prasanjit Mahtha v. The United Commercial Bank Ltd. (**A.I.R. 1979 Patna, 151) wherein it is observed that the very nature of a contract of guarantee does not stipulate for the

surety to receive or, for that matter, retain the money or advantage himself as the actual beneficiary is the principal debtor. In my opinion, the guarantee (Exh.P-5) was executed by way of regularisation of the earlier account under the rehabilitation scheme and therefore the defendants cannot be heard to say it was executed without consideration. This Court in the case of **Central Bank of India v. Tarseema Compress Wood Manufacturing Company and others** (A.I.R. 1997 Bombay, 225) has reiterated the legal position that consideration can be either past or present or even future.

13. The third submission made on behalf of the defendant No.3 is that the hypothecated goods were lost on account of the negligence of the Bank. This was part of Issue No.6. Learned Advocate Shri Lotlikar on behalf of the defendant No.3 placed reliance on Section 141 of the Indian Contract Act which reads as follows :-

``141. Surety's right to benefit of creditor's securities. - A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.''

14. Learned Advocate Shri Lotlikar has further submitted that the security in this case were the hypothecated goods which have been lost by the Bank. Shri Lotlikar has placed reliance on the cases

of **Amrit Lal Goverdhan Lalan (dead) by his legal representative v. State Bank of Travancore and others** (A.I.R. 1968 S.C., 1432) and **The State Bank of Saurashtra v. Chitranjan Rangnath Raia and another** (A.I.R. 1980 S.C., 1528).

15. In the first case the goods were pledged with the Bank and the Hon'ble Supreme Court in that context observed that:

> ``The surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor ; not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract but upon a principle of natural justice."

Further the Hon'ble Supreme Court observed that if the creditor has lost or parted with the security without the consent of the surety the latter is, by the express provision contained in Section 141, discharged to the extent of the value of the security lost or parted with. The Hon'ble Supreme Court therefore concluded that the principle of the Indian Contract Act applies to that case and **th**e surety was discharged of the liability to the Bank to the extent of Rs.35,690/- . The second case was again a case of pledge which were kept under lock and key and under the supervision of the Bank and

again the Hon'ble Supreme Court upheld the contention that Section 141 was attracted. In this case a reference was made to the case of State of Madhya Pradesh v. Kaluram (A.I.R. 1967 SC 1105). It was a case where the said Kaluram had executed a surety bond undertaking to discharge the liability arising out of any act or omission or negligence or default of a forest contractor whose bid was accepted at an auction held for sale of felled trees and who was required to pay the bid amount in four instalments. The forest contract rules provided for preventing the contractor from removing the forest goods in case he made default in payment of the instalments due. The authorities responsible for supervising the contract allowed the contractor to remove the felled trees without making the subsequent payments. Subsequently the State of Madhya Pradesh initiated proceedings to recover the balance of the amount through surety Kaluram. The surety Kaluram contended before the Court that because the State had lost or parted with the security namely, forest produce, he stood discharged. The said contention was upheld, observing that :

> ``The defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiffs; and he was entitled, therefore, to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He will, however, be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes

> in Rees v. Barrinton – 2 White and Tudor's L.C. 4th Edn. At p. 1002 – 'As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands.''

16. The submission of the learned Advocate Shri Lotlikar is that the principle of Section 141 of the Indian Contract Act applies to a case of pledge as well as to a case of hypothecation of goods. However, learned Advocate Shri P.P. Singh has submitted that what is true of a pledge cannot be true in case of hypothecation and in support of the said submission, learned Advocate Shri P.P. Singh has relied on the Division Bench decision in the case of **Bank of India, Bombay v. Yogeshwar Kant Wadhera and others (A.I.R. 1987** P. & H., 176) . In this case it has been observed distinguishing the case of **Amrit Lal Goverdhan Lalan** (supra) **and The State Bank of Saurashtra** (supra) that:

> ``Hypothecation of goods is a concept which is not expressly provided for in the law of contracts, but is accepted in the law merchant by long usage and practice. Hypothecation is not a pledge and there is no transfer of interest or property in the goods by

the hypothecator to the hypothecatee. It only creates a notional and an equitable charge in favour of the hypothecatee and the right of hypothecatee, as already stated, is only to sue on the debt and proceed in execution against the hypothecated goods, if they are available. As delivery of possession is not a sine qua non for the creation of a notional charge under a deed of hypothecation and as possession of the hypothecated goods is always with the hypothecator, a wide door is open to the owner to deal with the goods without reference to the hypothecatee. If, however, the hypothecator, contrary to the stipulation under the hypothecation bond, deals with the property, the breach on his part would certainly be noticed by the hypothecatee and he would be dealt with independently of him. It is in this context that the rights of a bona fide transferee for value of such goods are protected in law, for, the hypothecatee who fails to sequester the goods and reduce them into his custody, takes the risk of such clandestine dealings of the hypothecator. If the hypothecatee expressly or constructively notifies the equitable charge, matters would be different; even so, when the hypothecatee has constructive possession of the goods, though not physical possession of the same. In this case, it is not pretended that any such express or constructive notice of the existence of the hypothecation was ever given, nor it is claimed that the hypothecatee, namely, the plaintiff , did ever come into possession of the goods which were the subject-matter of Exhibit A-1. In the absence of such a constructive notice or express notice to the public at large, the right of the hypothecatee is that of a bare private money creditor with the ancillary right to proceed against the goods hypothecated after obtaining a decree in a Court of law. Thus, a hypothecation is a right in a creditor over a thing belonging to another and which consists in the power in him to cause the goods to be sold in order that his debt might be paid to him from the sale proceeds. This right is distinguishable from a mortgage of chattels.``

17. The Bench further observed that :

``As in hypothecation, the possession of the goods hypothecated is with the borrower, it will be wrong to say that the goods are in the constructive possession of the creditor Bank because it has no effective control over them. By hypothecation, only an equitable charge is created and nothing more. Similarly, the borrower could not be called an 'agent' of the creditor Bank in this respect while dealing with the hypothecated goods unless so authorised by the bank. It cannot be disputed that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract, as contemplated under S.128 of the Contract Act. Section 140 provides that where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place , the surety, upon payment or performance of all that he is liable for is invested with all the rights which the creditor has against the principal debtor. The Court further observed that the provisions of Sections 128 and 140 came for consideration before the Supreme Court in the case of **Bank of Bihar v. Damodar Prasad (A.I.R. 1969 S.C., 297),** wherein it was held that under S.128, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety thus becomes liable to pay the entire amount. His liability is immediate. It is not deferred until the creditor exhausts his remedies against the principal debtor. In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against principal in some other proceedings. Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain the execution against him until the creditor has exhausted his remedies against the principal. There is no gainsaying that in this case, the Supreme Court was not addressing itself to S.141 of the Contract Act, but still on the general principles relating to the surety, coupled with the fact that in case of hypothecation, the possession over the security, i.e., the goods, does not remain with the creditor and, therefore, the surety in such a case is not entitled to the benefit of S.141, we hold that the view taken by the learned single Judge in **M/s Quality Bread Factory's** case (AIR 1983 Punj. Har. 244) (supra), is not correct to the extent it goes in favour of the surety in the case of hypothecated goods also."

18. In the case at hand the hypothecated goods were lying in the corner of the factory in possession of the defendants. The plea put forward by defendant No.3 that he ever demanded that he be handed over the goods is a plea which cannot be accepted. In case of pledge, it is the creditor who remains in actual possession of the goods pledged. In the case of hypothecation, the hypothecated goods do not remain in physical control of the creditor but remain under the actual and physical possession of the borrower. In the case at hand the hypothecated goods were very much in possession of the defendant/Company of which the defendant No.3 was an Executive Director. I am fully in agreement with the principle laid down by the Punjab and Haryana High Court in the case of **Bank of India v. Yogeshwar Kant Wadhera (supra)** and hold that the principle of Section 141 is not applicable in the case of hypothecated goods. Issue No.6 therefore ought to have been answered against defendant No.3.

15. In view of the above, Judgment and Decree dated 30.6.1997 of learned First Addl. Civil Judge Senior Division, Margao, cannot be sustained. The appellant/Bank deserves to succeed in the present Appeal. As a result, the said Judgment/Decree dated 30.6.1997 is hereby set aside. Consequently the suit filed by the plaintiff/Bank is now hereby decreed as against defendant No.3

jointly and severally with the other defendants for the recovery of Rs.1,11,627.54 with pending and future interest at the rate of 12.25% per annum and Rs.88,966.29 with pending and future interest at the rate of 11% per annum from 12.6.1981 until payment. Costs by Defendant No.3.

N. A. BRITTO, J.

sl.